

No. 18672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL SHIPPERS ASSOCIATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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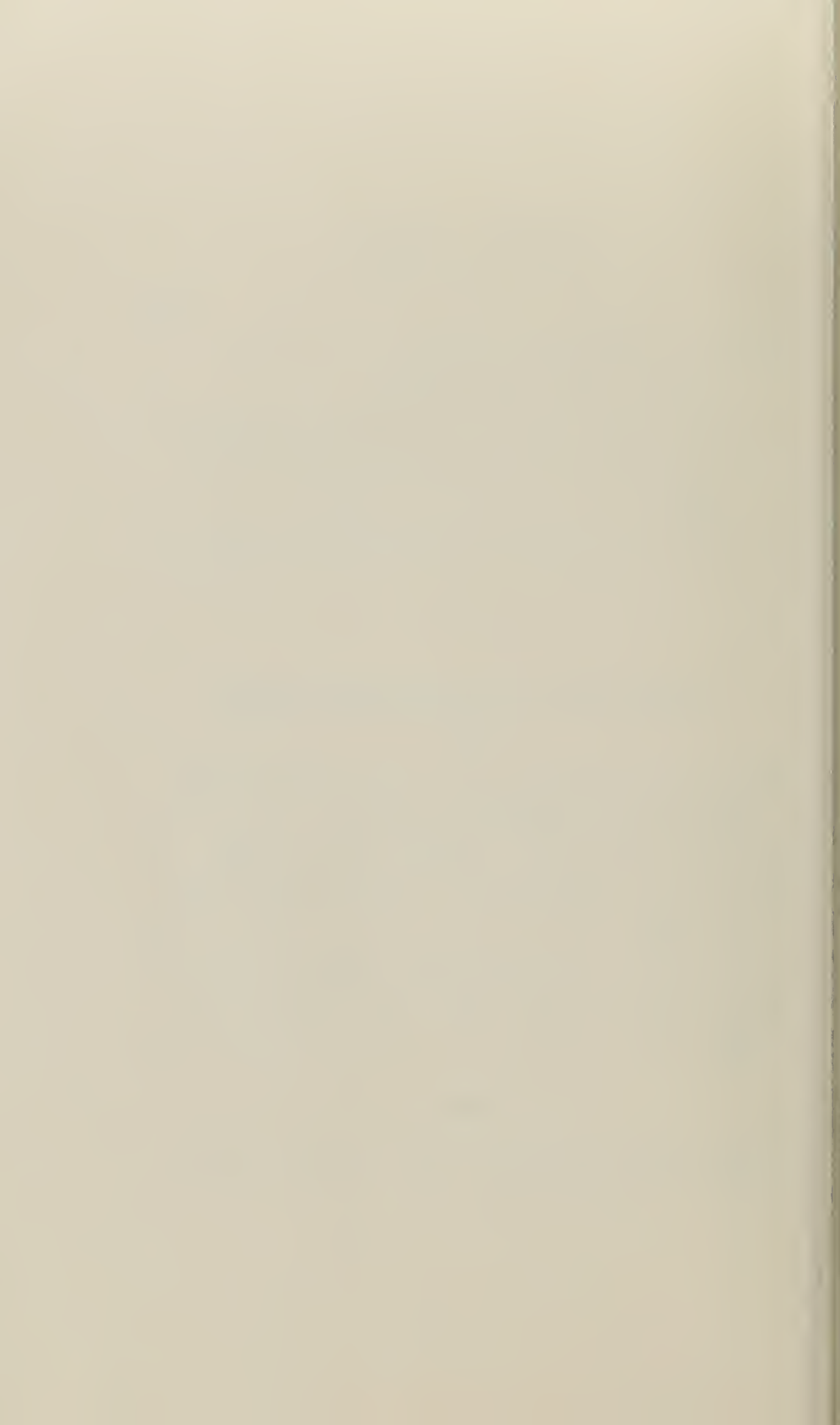
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PETITION FOR REHEARING.

Pursuant to Rule 23 of this Court, appellee herein respectfully petitions this Court for rehearing in the above-captioned cause.

Oral argument in this matter was heard on December 2, 1963, before Circuit Judges Richard H. Chambers, Stanley N. Barnes, and William E. Orr. The opinion and decision of this Court was filed on February 25, 1964, and this petition is filed herewith within the time provided therefor by provision of Rule 23 of this Court.

Grounds for Granting a Rehearing.

1. Effect of This Court's Decision.

The Court's previous decision is not an insignificant one which pertains only to the case at hand. It will affect a nation-wide law enforcement program of the Interstate Commerce Commission.

2. **The Statute Involved Was Improperly Construed.**

The Court applied a hyper-technical and unduly strict construction of the Elkins Act which was intended to be broadly interpreted, and is not subject to the general rule that criminal statutes are to be strictly construed.

Union Pacific Railroad Co. v. United States, 313 U. S. 450, 461-462 (1941);

United States v. Koenig Coal Co., 270 U. S. 512, 519 (1926);

United States v. Union Stock Yards, 226 U. S. 286, 307, 309 (1912);

Louisville and Nashville v. Mottley, 219 U. S. 247 (1911).

3. **The Statute Involved Was Misapplied to the Evidence.**

The Court incorrectly held that no violation of the Elkins Act occurred when appellant "took" advantages not available to other shippers because they could not be "accepted or received" unless they were "given" by the railroad.

United States v. Koenig Coal Co., 270 U. S. 512 (1926).

The Court further erred in holding that the obtaining of credit for freight charges by appellant, for periods longer than those available to other shippers does not constitute a concession or discrimination under the Elkins Act.

Hocking Valley Railway Co. v. United States, 210 Fed. 735 (6th Cir. 1914), cert. denied 234 U. S. 757 (1914).

4. The Court Ignored or Misconstrued the Evidence.

The Court incorrectly distinguished the present case from the *Koenig* case, *supra*, with the statement that in *Koenig* “the defendant had made a misrepresentation to a railroad which resulted in defendant’s receiving” something not available to others. The evidence in the present case showed that appellant also made misrepresentations to a railroad to the effect that it would pay its freight charges on time, that it was able to pay on time, and that in specific instances it was then making payments which were not in fact made. These misrepresentations also resulted in appellant’s receiving something not available to other shippers.

The Court incorrectly found that appellant did not solicit the credit extensions it “took” because appellant did not “request” for a particular shipment more time to pay than was available to other shippers. The Court apparently ignored the evidence that credit is not extended with respect to particular shipments, but that shippers are placed in a credit *status* which applies to all shipments. Appellant’s acts of solicitation were pointed toward obtaining and retaining credit *status*, and included: (1) agreeing to abide by Interstate Commerce Commission credit regulations if credit were given to appellant; (2) shipping with knowledge that appellant might not be able to pay its bills on time; (3) threatening to take its business away from the railroad if appellant’s credit was suspended for failure to pay on time, or if appellant were given any further trouble on the matter of credit; (4) asking the railroad to be

“understanding” about appellant’s lateness in paying freight charges; (5) falsely advising the railroad that delinquent payments were being mailed that day, when payments were never mailed—thus inducing the railroad not to remove appellant from its credit status and enabling appellant to ship more goods on credit for which appellant never paid; (6) advising the railroad that appellant’s bank balance was larger than it really was; and (7) asking the railroad for more time to pay delinquent freight charges which the railroad was trying to collect.

The Court made an irrelevant and erroneous distinction between acts of solicitation occurring before a *shipment* and those occurring afterwards. The evidence showed that shippers were all treated alike in being required to pay their bills within five days after the freight bills are presented to them. The date of such presentation is always subsequent to the date of shipment. The date of shipment is in no way relevant to the case since any possible discrimination must occur at the end of the allowed credit period, not the time of shipment. The evidence showed that when shippers do not pay within the required credit period, their credit status is suspended and all future shipments are required to be paid for before the railroad releases the goods to the shipper. When the railroad inquired about appellant’s delinquent freight bills [Ex. 45] and was told by appellant that it was airmailing a check to cover the delinquent bills that day [Ex. 45, p. 2], appellant misrepresented the facts to the railroad and by deceit

induced the railroad to release goods appellant had shipped, thus preventing the railroad from retaining the goods until payment was made and enabling appellant to take more time to pay than was available to other shippers.

Respectfully submitted,

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Certificate of Counsel.

I certify, that in my judgment, this petition for re-hearing is well founded, and that it is not interposed for delay.

DAVID R. NISSEN

